Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 1996

SHERRY BURT
Petitioner

v

DWIGHT RASHAD
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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82 pp

STATEMENT OF QUESTION PRESENTED

DID THE MAJORITY OF THE COURT OF APPEALS IGNORE *DIXON v UNITED STATES* IN STATING THAT "IF THE SAME EVIDENCE WILL SERVE FOR BOTH CONVICTIONS — IRRESPECTIVE OF WHETHER THE CONVICTIONS ARE UNDER STATUTES THAT SATISFY *BLOCKBURGER'S* 'SAME ELEMENTS' TEST — THE SECOND PROSECUTION IS BARRED BY DOUBLE JEOPARDY," AND DOES ITS OPINION CONFLICT WITH THAT OF OTHER CIRCUITS IN FINDING THAT ONLY ONE PROSECUTION WAS PERMITTED FOR A "STASH" OF COCAINE FOUND IN THE RESPONDENT'S HOME AND ANOTHER "STASH" SEALED IN A HIDDEN COMPARTMENT

IN HIS AUTOMOBILE PARKED AT THE HOME, THE MAJORITY ESSENTIALLY ADOPTING A SAME TRANSACTION TEST WHICH HAS REPEATEDLY BEEN REJECTED BY THIS COURT ("THE CONCERN ... IS WHETHER A DEFENDANT IS BEING PROSECUTED TWICE FOR THE SAME ACT OR TRANSACTION ...") AND REQUIRING THE PROSECUTION TO AGGREGATE SEPARATE CACHES OF THE DRUG WHERE THERE IS NO LEGAL REQUIREMENT TO DO SO?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOW COMES the Sherry Burt, Petitioner, through John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief, Research, Training & Appeals, and Don W. Atkins, Principal Attorney, Appeals and prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered

on March 14, 1997, and the order denying the petition for rehearing en banc entered by the Court of Appeals for the Sixth Circuit on June 18, 1997.

OPINIONS AND ORDERS BELOW

The August 30, 1995 report and recommendation of the magistrate judge is appended below as Appendix A. The November 30, 1995 order of the United States District Court judge granting the petition for a writ of habeas corpus is appended below as Appendix B. The March 14, 1997 opinion of the Court of Appeals for the Sixth Circuit is reported at 108 F.3d 677 (6th Cir. 1997) and is appended below as Appendix C. The June 18, 1997 order denying the petition for rehearing en banc is appended below as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States District Court was entered on November 30, 1995. The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 14, 1997. The order

of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc was entered on June 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." *U.S. Const. amend. V.*

STATEMENT OF THE CASE

In April, 1989, the respondent was tried before a jury on a charge of possession with intent to deliver over 650 grams of cocaine [contrary to MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i)]. That case (Recorder's Court No. 88-11275) arose from the seizure of the controlled substance in a basement storage area of a house located on Greydale in the City of Detroit. On April 20, 1989, Mr. Rashad was found guilty of possession of cocaine over 650 grams. On May 22, 1989, he was

sentenced to a term of 40-to-100 years.

On October 18, 1989, Mr. Rashad was tried without a jury before Recorder's Court Judge Edward M. Thomas, on a charge of possession with intent to deliver over 650 grams of cocaine [also in violation of MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i)]. That case (Recorder's Court No. 88-12274) concerned the discovery of a large quantity of cocaine in a hidden compartment inside the car which Mr. Rashad was driving when he arrived at the Greydale address. A pretrial motion to dismiss on double jeopardy grounds (due to his prior conviction for the cocaine found inside the house) was denied. Mr. Rashad had argued that the cocaine found in his car should have been combined with that found in his house so as to permit only one prosecution.

At trial, it was shown that while conducting a "pre-raid surveillance" of the house on Greydale, police officers saw the respondent drive a 1988 Lincoln bearing Tennessee license plates into the

driveway. When Mr. Rashad got out of the car, he was carrying a black briefcase and appeared to be holding a set of keys. He walked onto the porch of the house and used a key to unlock the grate covering the door and entered the house. When the officers entered the house about ten minutes later, they saw Mr. Rashad, a woman, and a baby. They also saw a black briefcase in the house which appeared to be the same one Mr. Rashad was holding when he entered the house. Inside the briefcase, the officers found a driver's license bearing the respondent's picture but having a different address. Also found in the briefcase was a set of keys for the front entrance of the house as well as a locked storage area under the basement steps within which the officers found a large quantity of cocaine (approximately six kilograms), packaging materials, scales, and cutting agents.

As the result of information from the handler of a narcotics dog which reacted to a "sniff" of the car which was still parked in the driveway, the trunk of the car and the interior were searched. This search

resulted in the discovery of cocaine residue in the rear seat area. As a result, the car was taken to the police property section and locked.

After the Lincoln was impounded on September 7, it was kept locked and in a police impoundment area. On September 22, 1988, a search warrant for the vehicle was obtained as the result of an anonymous tip that a large quantity of cocaine was hidden in the car. A search was conducted and inside a quarter panel in the rear passenger area (a panel which supports the arm rest), a clear plastic bag containing a large amount of white powder was found which later proved to be several kilograms of cocaine. Also removed from the same area and placed in evidence was a loaded nine millimeter handgun as well as several bundles of heroin and a wallet. The wallet contained various items of identification, including a picture driver's license which was a different one from that found in the briefcase.

As to the difficulty which the officers encountered in locating and removing the narcotics, the process of "disassembling" the interior

portions of the car took the officers one and one-half to two hours to complete. Due to the nature of the concealment, the recovery of the drugs was not a task which could have been accomplished in "a matter of seconds".

After the last prosecution witness testified, it was stipulated that the separate quantities of cocaine concealed in the car amounted to 750.91 and 4,022.17 grams, respectively. The defense rested without calling any witnesses.

On October 23, 1989, Judge Thomas found him guilty as charged. On November 3, 1989, he was sentenced to a nonparolable term of life imprisonment.

On June 23, 1992, the Michigan Court of Appeals affirmed both convictions and specifically held that Mr. Rashad's subsequent trial for the cocaine found in the car was not barred by double jeopardy. The court vacated the 40-to-100 year sentence and remanded for resentencing in compliance with the statutorily-mandated term of nonparolable life.

Judge E. Thomas Fitzgerald issued a separate opinion wherein he dissented in the majority's conclusion that double jeopardy did not apply.

By order dated May 14, 1993, the Michigan Supreme Court denied the respondent's application for leave to appeal. Chief Justice Cavanagh and Justice Levin would have granted leave to appeal.

On May 6, 1994, Mr. Rashad filed in the United States District Court a petition for writ of habeas corpus, claiming that double jeopardy principles were violated when he was prosecuted and convicted for possession with intent to deliver the cocaine found in the car. The Honorable Paul D. Borman adopted the August 30, 1995 Report and Recommendation issued by Magistrate Judge Donald A. Scheer which agreed with the respondent's double jeopardy argument and granted the writ of habeas corpus by Order dated November 30, 1995.

By opinion dated March 14, 1997, the Court of Appeals for the Sixth Circuit affirmed the district court's grant of the writ of habeas corpus on the grounds that the respondent's second state prosecution

violated the Double Jeopardy Clause because it was part of the same transaction or criminal episode for which he had been tried and convicted of in an earlier proceeding. Circuit Judge Wellford filed a separate dissenting opinion. Rashad v. Burt, 108 F.3d 677 (6th Cir. 1997). By order dated June 18, 1997, the Court of Appeals denied a petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

In concluding that the Respondent had been subjected to multiple prosecutions based upon the same "fact situation", thus violating the Double Jeopardy Clause of the Fifth Amendment, the Sixth Circuit Court of Appeals held that the cocaine found in his house as well as that found in his car constituted a "single transaction" (108 F.3d at 680-681). Despite the lack of any legal requirement to do so, the court would require the prosecution to aggregate the two clearly separate quantities of the drug. While the court acknowledged that *Blockburger* v. *United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932) sets

forth the traditional "same elements" test for double jeopardy claims, it also stated that *Blockburger* was inadequate to reach a determination of the double jeopardy issue in this case (108 F.3d at 680):

> "The *Blockburger* standard, then does not help us resolve a double jeopardy inquiry involving successive prosecutions. The concern in such a situation is whether a defendant is being prosecuted twice for the same act or transaction. The proper standard for determining if this has occurred, and thus if the two prosecutions violate double jeopardy, is to ask whether the actual evidence needed to convict the defendant in the first trial is the same as the evidence needed to obtain the second conviction. **If the same evidence will serve for both convictions - irrespective of whether the convictions are under statutes that satisfy *Blockburger's* "same elements" test - the second prosecution is barred by double jeopardy**." (emphasis added)

By utilizing a "same act or transaction" approach to the question of multiple prosecutions for a double jeopardy analysis, the court was, in fact, using a "same conduct" test which was adopted by this Court in *Grady* v. *Corbin*, 495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 (1990). In addition to passing the *Blockburger* "same elements" test, the "same

conduct" test provided that "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," a second prosecution may not be instituted. 495 U.S., at 510, 109 L.Ed.2d 548, 110 S.Ct. 2084.

Three years later, however, this Court overruled *Grady* and re-affirmed the *Blockburger* test in the case of *United States* v. *Dixon*,509 U.S. ___, 125 L.Ed.2d 556, 113 S.Ct. 2849 (1993).[1]. Remarkably, neither *Grady* nor *Dixon* are cited in the opinion of the court of appeals. In applying what is essentially a "same transaction" test (which this Court has repeatedly rejected), the majority ignored this Court's most recent pronouncement on the question of double jeopardy.

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[1] One year before *Dixon* was decided, this Court in *United States v. Felix*, 503 U.S. 378, 118 L.Ed.2d 25, 112 S.Ct. 1377 (1992) held that double jeopardy did not bar a conspiracy prosecution even though some of the overt acts were based on substantive offenses for which the defendant had been previously convicted. This was a clearly profound exception to the rule announced in *Grady*.

By properly applying the "same elements" test (or, for that matter, the now discredited "same conduct" test), it is readily apparent that no double jeopardy violation occurred because there exist sufficiently significant differences between the two prosecutions which establish adequate grounds to conclude that each separate cache constituted a distinct and separate criminal transaction.[2] Stated differently, while there was an overlap in the evidence presented in both prosecutions, the specific quantity of cocaine involved in each case was separate, unique and distinct. In general terms, the elements of the offense in each prosecution were the same because each offense involved a violation of the same statutory provision. In a specific factual sense, however, the controlled substance was actually different, being physically separate caches of cocaine.

Where separate caches are found at completely different locations

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[2] See e.g. Judge Wellford's dissenting opinion (108 F.3d at 682-683).

and/or under conditions which do not permit ready access, it can reasonably be inferred that they do not share a sufficient degree of commonality to require that they be combined to support a single criminal prosecution.

In the instant case, the cocaine was not located in a secure area within a permanent and immovable structure. It was hidden in an automobile which was registered in another state.[3] Moreover, the perpetrator had expended great effort in sealing the cache behind normally inaccessible recesses of the car's internal structure. At the time that the police secured the house and the car, the location and manner of concealment of the two separate quantities of cocaine clearly evince separate and distinct "possessions" which support separate prosecutions.

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[3] There was no evidence admitted to establish whether the respondent had just returned from Tennessee with the cocaine in order to combine it with that which was already in the house or whether the cocaine had once been a part of the cocaine stash in the house which he now intended to transport to Tennessee or to any other location.

In short, the cocaine found in the house was readily accessible and immediately available for processing and distribution. The cocaine later discovered in the car was not readily accessible (even to the owner of the drug). It was in bulk form with no immediate means available to prepare it for distribution in smaller quantities and it was located in the vehicle for the obvious purpose of transporting it from one location to another.

Equally important is the fact that the decision in this case is in clear conflict with decisions in at least four other federal circuits. Under similar factual circumstances, various caches of narcotics **are** divisible for purposes of prosecution and do not violate the Double Jeopardy Clause.[4]

In *United States* v. *Maldonado*, 849 F.2d 522 (11th Cir.

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[4] Remarkably, both the majority and the dissenting opinions cite the same cases in support of their respective positions. See 108 F.3d at 681 (majority op.) and 108 F.3d at 683, fn 2 (dissenting op.).

1988), the court rejected the defendant's double jeopardy claim that separate charges of cocaine possession should have been combined. In one count, he was charged with possession of cocaine found in his car when he drove from his house to Daytona Beach where he intended to deliver it. A later search of his house (located in another county) uncovered another stash of cocaine for which he was charged in a second count.

In *United States* v. *Blakeney*, 753 F.2d 152 (D.C.Cir. 1985), separate convictions of possession of marijuana with intent to deliver were upheld, despite a double jeopardy challenge, where one stash was found at the defendant's place of employment and a second stash was discovered in his apartment which was "several miles distant from his place of employment and across the Anacostia River" (753 F.2d at 154). The court noted that the larger amount in his apartment was found together with a scale and packing materials.

In the instant case, cocaine found in the house was discovered

along with scales, mixers, cutting agents and packaging materials. It was clearly ready for immediate distribution. The cocaine in the car might as well have been "several miles away" (as in *Blakeney*) because it was not readily available for processing and was not packaged for immediate distribution.

In *United States* v. *Costa*, 947 F.2d 919 (11th Cir. 1991), the defendants were convicted of conspiracy to import cocaine and three counts of importing the drug which arrived in the United States in three boats. It was argued that "because the load (of cocaine) started in one lump in the Bahamas and ultimately wound up as one lump in Florida, the fact that it actually came into the United States on three boats is irrelevant." (947 F.2d at 926). The court noted that nothing in the (federal) statute required the government to aggregate the amount of drugs from the point of origin to the point of destination and, in a footnote, added the following observation (947 F.2d at 926, fn 9):

> Were this argument to hold true, then even if the cocaine were smuggled into the United States at different

> locations via various means of transportation, there should be only one violation of (21 U.S.C.A.) 952 provided that the smugglers are careful about ultimately reaggregating their goods.

If separate boatloads of cocaine which admittedly came from one original "lump" can provide a basis for multiple counts of an indictment or multiple prosecutions, it should be clear that two separate caches of cocaine (which are not known to have ever come from one undivided source **or** where ever intended to be combined for distribution) can result in multiple state prosecutions where there is no legal requirement that the amounts be combined for prosecution.

In the context of double jeopardy claims not involving narcotics, other cases also prove to be enlightening. In *United States* v. *Palacios*, 835 F.2d 230 (9th Cir. 1987), the defendant was convicted of passing counterfeit bills and of possessing certain other bills found in his pocket after he left the bank where he had just passed the bills. The defendant claimed that since his possession of counterfeit currency was necessarily included within the illegal passing double jeopardy barred the filing of

a two-count indictment. In rejecting this claim, the court noted that the defendant would have had to make the bank teller aware that he intended to pass the bills hidden in his pocket in order to convey his intent that all of the bills were meant for a single distribution. Since he did not do that, the multiple counts did not violate double jeopardy.

Similarly, in the instant case, Mr. Rashad did not demonstrate an intent to combine the two stashes of cocaine. He, like Palacios, remained silent and did not disclose the location of his other "stash". It was only discovered after laborious efforts were expended by the police in first learning of its location and then dismantling his car.

In *United States* v. *Gallardo*, 915 F.2d 149 (5th Cir. 1990), the court found that multiple convictions and consecutive sentences for mailing four separate letters containing child pornographic matter (even though three of the envelopes were mailed at the same time) constituted four separate criminal violations and did not violate double jeopardy.

In light of the facts presented by this case as well as an objective

and realistic view of the cases cited herein, it becomes apparent that Mr. Rashad was not denied his rights under the Double Jeopardy Clause.

CONCLUSION

WHEREFORE, Petitioner prays that this Court grant certiorari and reverse the decision of the Sixth Circuit Court of Appeals and thereby vacate the order granting the writ of habeas corpus.

Respectfully submitted,

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DWA/jh
Dated: August 5, 1997

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWIGHT RASHAD,

Petitioner,

V.

SHERRY BURT,

Respondent.

CIVIL ACTION NO. 94-CV-71785-DT
DISTRICT JUDGE PAUL D. BORMAN
MAGISTRATE JUDGE DONALD A. SCHEER

_____/

REPORT AND RECOMMENDATION

I. RECOMMENDATION:

This cause comes before the Court upon Dwight Rashad's May 6, 1994, Petition for a Writ of Habeas Corpus, pursuant to U.S.C. §2254; upon Respondent's Answer to the Petition, filed on March 16, 1995; and upon Petitioner's Supplemental Memorandum, filed on January 31, 1995. The Respondent has also filed a certified copy of the state court proceedings. After review of the pleadings, and for the reason stated herein, it is recommended that the Petition for a Writ of Habeas Corpus be granted.

II. REPORT:

A. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner is a state prisoner, confined at the Ryan Regional Correctional Facility, in Detroit, Michigan. Respondent, Sherry Burt, is the Warden of that facility.

On September 7, 1988, the Detroit Police Department conducted surveillance on a residence at 20219 Greydale, Detroit, Michigan. Their purpose in being there was the execution of a search warrant for drugs contained in the residence. During the surveillance, Petitioner, Dwight Rashad, arrived at the house in a 1988 Lincoln automobile. Carrying a black briefcase, he entered the front door by means of a key. Approximately ten minutes after Rashad entered the residence, the officers executed the search warrant. Inside they found Petitioner, Sheila Bufkins, and an infant. Once the premises and its occupants were secured, the police brought a drug detection dog into the residence. The dog alerted to a locked storage area located in the basement. Forced entry into that area resulted in the discovery and seizure of approximately

5 kilograms of cocaine, packaging material and narcotic paraphernalia. A coffee can seized from the storage area was later found to bear Petitioner's fingerprints. Several kilogram sized bricks of cocaine were wrapped in green paper.

Inside Rashad's briefcase, officers found a driver's license bearing Petitioner's photograph, but a different name and address. Also located was a key ring containing keys to the front entrance and drug storage area of the house, and to the Lincoln automobile in which Rashad had arrived. Petitioner and Bufkins were arrested, and charged with possession of cocaine in excess of 650 grams within intent to deliver.

The police narcotic dog alerted to the interior of petitioner's car, which was parked in the driveway of the residence. A search of the car, however, revealed only suspected cocaine residue. The vehicle was impounded for subsequent forfeiture action, and remained in police custody.

Approximately one week later, informant information indicated that cocaine was stored in a compartment in the Lincoln. On September

19, 1988, a search warrant was obtained for the car. On September 22, 1988, a detailed search of the Lincoln led to the discovery of a compartment in a rear quarter panel. In the compartment, officers found a plastic bag containing approximately 4850 grams of cocaine, including 4 separate kilogram packages wrapped in green paper bearing the initials XELA. Also found were several bundles of heroin, a 9 millimeter handgun, and a wallet in which Petitioner's driver's license was found. Rashad was later charged, in a separate criminal case, with possession of cocaine over 650 grams with intent to distribute.

On April 20, 1989, Petitioner was convicted by a jury of possession of 650 or more grams of cocaine, based upon the drugs found in the Greydale residence. The trial court sentenced Rashad to a term of 40 to 100 years imprisonment.

In the second prosecution, based upon the cocaine found in the automobile, the defense moved to dismiss, claiming that the action was a successive prosecution for the same offense, and thus violated the Double Jeopardy Clause of the Fifth Amendment. The court denied the

motion, stating that the successive prosecutions related to separate transactions.

On October 23, 1989, in a bench trial, Petitioner was found guilty of possession of 650 grams or more of cocaine, with intent to distribute. He was sentenced to life imprisonment, without possibility of parole.

Petitioner filed an appeal of right in both cases. The appeals were consolidated. Among the numerous arguments presented in the direct appeal, Petitioner asserted the issue of double jeopardy as follows:

> WAS THE STATE OF MICHIGAN BARRED BY REASON OF DOUBLE JEOPARDY FROM TRYING THE DEFENDANT FOR POSSESSION OF NARCOTICS WITH INTENT TO DELIVER, IN TWO SEPARATE TRIALS WHERE THE SEIZURE OF ALL OF THE NARCOTICS INVOLVED WERE INTERRELATED, THE SAME WITNESSES WERE RELIED UPON IN BOTH TRIALS, AND THE OFFENSE INVOLVED WAS ALL PART AND PARCEL OF ONE SINGLE TRANSACTION?

On June 22, 1992, the Michigan Court of Appeals affirmed Petitioner's convictions in both cases. In rejecting Petitioner's double jeopardy argument, the court held that no "meaningful factual connection

[existed] between the cocaine found in Defendant's home and that found several days later in the quarter panel of Defendant's vehicle. The court determined that "Defendant's possession of the cocaine in the home was simultaneous to his possession of the cocaine in the vehicle, and not one unitary and continuous criminal episode." People v. Rashad, No. 118136, 118877, and 124060, at pg. 4 (Mich. App. 6/23/92).

Petitioner filed for leave to appeal to the Michigan Supreme Court. On May 14, 1993, that court denied his motion for leave to appeal. People v. Rashad, No. 94301, 94302, and 94303 (Mich. 5/14/93).

The sole issue raised on the instant petition for a writ of habeas corpus is whether Defendant's second State court prosecution violated the Double Jeopardy Clause.

B. JURISDICTION AND EXHAUSTION OF REMEDIES

A state prisoner seeking a writ of Habeas Corpus, pursuant to 28 U.S.C. 2254, must have fairly presented the substance of each constitutional claim to the state appellate courts, in order to qualify for

federal relief. Picard v. Conner, 404 U.S. 270, 277-78 (1971) ; Pillette v. Foltz, 824 Fd. 2d 494 (6th Cir. 1987) ; 28 U.S. C. §2254 (b), (c) . This exhaustion of remedies requirement is satisfied when the highest state court is afforded a fair opportunity to rule on the factual and legal basis of a federal constitutional claim. Anderson v. Harless, 459 U.S. 4, 6 (1982). Before raising an issue in a federal habeas petition, a Michigan prisoner must fairly raise the same issue in both the Michigan Court of Appeals and the Michigan Supreme Court. Hafeley v. Souders, 902 Fd. 2d 480, 483 (6th Cir. 1990) ; Dombkowski v. Johnson, 488 Fd. 2nd 68, 70 (6th Cir. 1973) The petitioner bears the burden of showing exhaustion of state remedies. Prather v. Rees, 822 Fd. 2d 1418, 1420 N.3 (6th Cir. 1987). In the case at bar, Petitioner' s double jeopardy claim has been previous presented to the state courts during Petitioner's appeals. Therefore, he has exhausted his state remedies as to the issue raised here.

Under 28 U.S.C. §2254, a petition for a Writ of Habeas Corpus cannot be entered unless Petitioner is in state custody, and it is alleged that his custody violates the U.S. Constitution or the laws of the United

States. Before the District Court can exercise jurisdiction in a §2254 action, the court must have personal jurisdiction of Petitioner's custodian. Braden v. Thirtieth Judicial Court of Kentucky, 410 U.S. 484, 495 (1973). In the instant case, Petitioner is in the custody of the respondent, Sherry Burt, at the Ryan Regional Correctional Facility, in Detroit, Michigan. Accordingly, this court has jurisdiction to review the petition.

C. DOUBLE JEOPARDY CLAIM

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. 5. The clause has been interpreted as protecting criminal defendants from successive prosecutions for the same offense after acquittal or conviction, as well as from multiple punishments for the same offense. Brown v. Ohio, 432 U.S. 161, 165 (1977). The question in the case at bar is whether the trial and conviction which resulted from the seizure of cocaine in the vehicle constituted a successive prosecution for the "same offence".

Each of Rashad's convictions was based upon a different

Michigan statute. In the prosecution based upon the cocaine seized from the residence, Rashad was originally charged with a violation of MCLA §333.7401. The jury found him guilty of a violation of MCLA §333.7403, a lesser included offense. In the second and subsequent trial, relating to the cocaine seized from the car, the court found Petitioner guilty of a violation of MCLA §7401. Petitioner correctly asserts that, with the exception of the intent to deliver in the later statute, the offenses contained the same elements. Where the same conduct is charged separately under different statutes, the relevant inquiry involves a comparison of the elements of each offense, to determine "whether each [statutory] provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). If each offense contains an element not contained in the other, they are not the "same offence," and double jeopardy will not bar a successive prosecution (or additional punishment) United States v. Dixon, 113 Sup. Ct. 2849, 2856 (1993). In applying the Blockburger test, the court must focus upon the proof necessary to establish the statutory elements of each crime, rather

than upon the specific evidence or arguments presented at trial. Illinois v. Vitale, 447 U.S. 410, 416 (1980) ; Pryor v. Rose, 724 Fd. 2d 525, 529 (6th Cir., 1984). In comparing the two offenses of which Petitioner was found guilty, I find no element of the crime of possession of cocaine in excess of 650 grams which is not also contained in the crime of possession of cocaine in excess of 650 grams with intent to distribute. Application of the "Blockburger test" would thus appear to support Petitioner's contention that he was twice tried for the same offence. I am persuaded, however, that the resolution of this case should not be governed by the direct application of the "same elements" analysis. The test established in Blockburger has been held to be a rule of statutory construction. Albernaz v. United States, 450 U.S. 333, 340 (1981) ; Missouri v. Hunter, 459 U.S. 359 (1983) ; Beam v. Foltz, 832 Fd. 2d 1401, 1411 (6th Cir. 1987) . Even more important, the Blockburger test is only applicable where multiple punishments (or prosecutions) are based upon the same conduct. Whether or not the two prosecutions of Rashad were based upon the same act or transaction is the heart of the

controversy in this case.

Respondent argues that the state court's determination that the successive charges against Rashad were not based upon the same transaction are entitled to complete deference, under the holding in Sumner v. Mata, 455 U.S. 591 (1982). However, in Pryor v. Rose, 724 F. 2d 525, 528 (6th Cir. 1984), the Sixth Circuit discussed that often quoted rule, also in the context of a double jeopardy claim:

> "Before considering the merits of this question, we must address the appellant's claim that certain state court findings are entitled to a presumption of correctness under Sumner v. Mata, 449 U.S. 539, 101 Sup. Ct. 764, 66 Law. Ed. 722 (1981)... . The presumption of correctness attaches neither to state court conclusions of law, Marshall v. Lonberger, U.S. , 103 Sup. Ct. 843, 849, 74 Law. Ed. 2d 646 (1983), nor to state court applications of law to the facts of individual cases. Sumner, 449 U.S. 544, 101 Sup. Ct. 767.11

Id. at 528. The appellate court's determination that the two charged offenses did not arise out of the same transaction was an application of law to the facts. Therefore, the Sumner presumption of correctness does not apply.

The majority opinion of the Michigan Court of Appeals addresses the legal standard and the facts, as follows:

> "'the Double Jeopardy Clauses of both the United States and Michigan Constitutions protect against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offence. "'People v. Jackson, 1563 Mich. Apps. 38, 41; 394 N.W.2d 380 (1986). In Michigan, the same transaction test is the proper standard to be applied when examining successive prosecutions. Jackson, 153 Mich. App. 42. The same transaction test requires the prosecutor to join at one trial all the charges against defendant which grew out of a continuous time sequence and displayed a single intent and goal. People v. Sturgis, 428 Mich. 392, 401; 397 N.W. 2d 783 (1986). In this case the record does not indicate a meaningful factual connection between the cocaine found in defendant's home and that found several days later in the quarter panel of defendant's vehicle. People v. Jackson, 153 Mich. App. 38, 49-50; 394 N.W. 2d 480 (1986). Cocaine confiscated from the home was found with packaging materials, sifters or mixers and cutting agents, implying that defendant intended this supply for future distribution. However, the cocaine confiscated from the Lincoln, supports the independent goal of transporting or delivering that cocaine to an unknown destination. Furthermore, it was never established that the cocaine found in the Lincoln was part of the same cocaine found in the house. The facts indicate that the defendant's possession of the cocaine in the home was simultaneous to his possession of the cocaine in the vehicle and not one

> unitary and continuous criminal episode. Jackson, 153 Mich. App. at 50. Finally, the police did not get a search warrant for the Lincoln until an informant told police that the vehicle contained contraband."

People v Rashad, No. 118136, 118877, 124060, at pg. 4 (Mich. App. 6/23/92).

I am unable to agree with the assessment of the Michigan Court of Appeals that Rashad's possession of the cocaine in his home and the cocaine in his automobile were not part of the same transaction. The seizure (though not the discovery) of both quantities of the drug resulted from the same confrontation with Rashad. His possession of both quantities occurred at the same time and place, and displayed a single intent and goal (i.e., distribution). Mr. Rashad's simultaneous constructive possession of two large quantities of cocaine, packaged in similar fashion, each locked within a secure compartment in property (real and personal) maintained by him are, to my mind, "meaningful factual connections". From the existence of packaging materials, sifters, mixers and cutting agents at the home, the Court of Appeals concluded

that the supply of cocaine located there was intended for "future distribution", while the cocaine in the car supported the "independent goal of transporting or delivering that cocaine to an unknown destination." The Court's conclusions are purely speculative. The facts no more support them than the alternative speculations that Rashad intended to combine both supplies, in either the house or the car, for future distribution, in bulk, or in multiple lots. Any of those alternative courses of action was equally available under the facts in this record. At the time of the police action on September 7, 1988, there was no evidence to support the inference that the full 10 kilograms of cocaine could not, and would not, be employed in a single distribution. At that point in time, Rashad possessed the full amount of the drug with the same intent of distributing it at whatever future times, and in whatever amounts best suited him. Absent evidence of separate and distinct dedications of the separate caches, his possession was a single, undivided offense.

It is interesting to note that the case of People v. Jackson, upon

which the Court of Appeals relied, involved the issue of whether a defendant convicted of delivery of a quantity of marijuana could be subsequently charged and convicted of possession of marijuana with intent to deliver, based upon other quantities of the drug recovered from his possession at a different location 45 minutes after the sale. In that case, the Court of Appeals quite rightly found that the two charged offenses, separated in character (distribution vs. possession) , time and location did not constitute a single transaction, or comprise an "essentially unitary criminal episode". Examination of the facts of the case reveals that the marijuana recovered from Jackson's home was seized from different places, including his person, his living room, his bedroom and his car. Jackson was charged, however, with a single count of possession of marijuana with intent to deliver.

The Sixth Circuit considered the issue of simultaneous possession of separately stashed quantities of controlled substances in United States v. Woods, 568 F. 2d 509 (1978). In that case, defendants were charged in a four count indictment. Count 1 charged possession with intent to

distribute 111.36 grams of heroin. Count 2 charged the defendants with distribution of 111.36 grams of heroin, based upon a sale of the drug to an undercover narcotics officer. Counts 3 and 4 charged possession with intent to distribute 115.37 grams and 95.34 grams of heroin, respectively, based upon the recovery of separate caches of heroin from the front seat and the trunk of the defendants, automobile. The court considered the issue of whether Counts 1, 3 and 4 were multiplicitous, thereby precluding separate convictions and sentences. Noting the lack of authority bearing directly on the claim of multiplicity as applied in cases of possession of controlled substances with intent to distribute them, the court was guided by the reasoning of its earlier opinion in United States v. Jones, 533 F. 2d 1387 (6th Cir. 1976), cert. denied, 431 U.S. 964 (1977). Jones was convicted in 3 counts of an indictment, each of which charged him with possession of a single revolver, on separate occasions. In holding that Congress intended only a single offense under the facts of the case, Judge Weick observed:

"Possession is a course of conduct, not an act; by

> prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm. If Congress had wished to punish each act of dominion, it could have done so easily by forbidding the acts of dominion instead of the course of conduct. In fact, Congress did declare the possessory acts of receiving and transporting firearms to be illegal, but Jones was not charged with performing such acts."

United States v. Jones, 533 F. 2d, at 1391. Recognizing that congressional history and legislative intent vary from statute to statute, the Court, in Woods, held that the Defendants could be found guilty of but a single count of possession with intent to distribute heroin. Part of the Court's reasoning was based upon the fact that the statute defining the offense did not graduate the gravity of the crime by the quantity possessed.[1] Under the Michigan statute at issue here, of course, possession of a quantity of a controlled substance in excess of 650 grams

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[1]The Court in Woods also based its holding, in part, upon the imprecise manner in which the individual counts were drafted. The separate caches of heroin were described only by weight in grams, and specific identification of the drug evidence by the location from which it was seized was not possible.

does aggravate the offense. As each quantity charged was in excess of that amount, however, I see no reason to reach a result different from that in Woods. Based on the evidence here, I conclude that Mr. Rashad possessed approximately ten kilograms of cocaine, in two separate parcels, at his residence, on September 7, 1988. The quantity of the controlled substance involved plainly supports the inference that it was intended for distribution. The evidence does not, however, indicate the quantity or quantities in which that distribution would take place. If the two caches had been combined, the applicable statutes would prescribe a penalty of life imprisonment. I find little to support the proposition that placing half of the drugs in his home, and the balance in his car, would justify Rashad's forfeiture of a second lifetime. Nothing in the evidence would directly support the conclusion that Petitioner subdivided the cocaine with the intent to dedicate any portion of it to a specific distribution.

In United States v. Johnson, 977 F. 2d 1360 (10th Cir. 1992), the Tenth Circuit Court of Appeals observed that "although a supply of

narcotics generally is not divisible for purposes of prosecution, various stashes of that drug are considered separate where the evidence indicates that they were intended for different purposes or transactions. Id. at 1374. Other federal cases considering the issue have determined that separate counts of possession of the same controlled substance will not violate the double jeopardy clause if the possessions are sufficiently differentiated by time, location or intended purpose. See United States v. Maldonado, 849 F. 2d 522, 524 (llth Cir. 1988) United States v. Blakenev, 753 F. 2d 152, 154-55 (D.C. Cir. 1985) United States v. Palacios, 835 F. 2d 230, 233-34 (9th Cir. 1987). In Johnson, a personal sized container of amphetamine was found along with a larger, commercial sized container of the same drug. Defendant's admission that he intended the small quantity for personal use only was a sufficient basis upon which to conclude that each separate stash constituted a "distinct criminal transaction," and would support a separate charge of simple possession of the smaller quantity and a separate and distinct charge of possession with intent to distribute the larger amount. 977 F. 2d 1360,

1373-74 (1992).

None of the legitimate bases for differentiating the stashes of cocaine in this case appear to exist. The entirety of the police confrontation with the petitioner occurred during the execution of their search warrant for his residence. The defendant co-located the two quantities of cocaine at his home. Both quantities were seized at essentially the same time and place. There is no evidence in the record from which it can be concluded that either quantity, or any specific amount of cocaine whatever, were intended by Rashad to be dedicated to a specific distribution. In the absence of "demonstrated intent" that the two caches of cocaine were for different purposes or transactions, their possession should have been charged in a single prosecution. United States v. Johnson, 977 F. 2d 1360, 1374 (10th Cir. 1992).

Under Michigan law, the term "same offense" has been defined by the "same transaction test", which requires the prosecution to join at one trial all the charges against a defendant which grew out of a continuous time sequence and display a single intent and goal. People v.

White, 390 Mich. 245, 258 (1973) ; Ashe v. Swinson, 397 U.S. 436, 453-54 (1970). In the case considered here, Rashad was found to be in simultaneous constructive possession of two large quantities of cocaine during a single and continuous police operation at his home on September 7, 1988. Both possessions were unified by a single intent and goal of distribution.

The facts of this case don't fit precisely into the patterns reflected in the reported cases. My conclusion that Rashad was twice placed in jeopardy for the same conduct flows substantially from the fact that a fully competent search of the car on the day of its seizure would have revealed the evidence necessary to charge possession of all the cocaine in a single count or, at the very least, in a single prosecution. Even the belated discovery of the drugs in the car did not preclude those alternatives, since the initial prosecution was still in its early stages.

> Successive prosecutions implicate a component of double jeopardy protection not implicated in single prosecutions of joined charges such as those involved in Blockburger and Gore: the protection against retrial itself. In this component, double jeopardy vindicates principles of

> finality and repose of former judgments and of fundamental fairness that simply are not involved in a joined charged prosecution. Basically it insures that having once "run the gauntlet" of criminal trial to judgement either of conviction or acquittal, a person shall not be 'required to run essentially the same gauntlet again. It protects not only against multiple punishments but against multiple trials for the same offense. see United States v Wilson, 420 U.S. 332, 343-44 (1975); Green v. United States, 355 U.S. 184, 187-88 (1975); United States v. Oppenheimer, 242 U.S. 85 (1916) . Because an additional interest is at stake, the test for determining whether the "same offense" is involved in successive prosecutions is one more protective of criminal defendants than the relatively strict "two offense" test of Blockburgrer that is decisive against defendants when satisfied in single prosecutions.

Jordan v. Commonwealth of Virginia, 653 F. 2d 870, 873 (1980) . The Court in Jordan determined that successive prosecutions based upon the same "fact situation" will not be permitted where the separate charges could permissibly have been joined, and no significant additional fact was required in the second prosecution. While the last requirement is somewhat troubling in the context of the case at bar, since Rashad's location of a portion of his cocaine in the car may be arguably "significant", I don't find the argument persuasive. Rather, I conclude

that the relevant "fact situation" includes Rashad's possession of both caches of cocaine. Relying on the holding of Brown v. Ohio, 432 U.S. 165, 169 (1977), the Court in Jordan observed that "... it is well settled that double jeopardy protections may not be avoided by the simple expedient of exercising prosecutorial discretion to "divid[e] a single crime into a series temporal or spatial units." 653 F. 2d 870, at 875.

I am persuaded that the State of Michigan has impermissibly instituted separate and successive prosecutions arising from the same crime. The "fact situation" presented in the instant case, involves the Petitioner' s possession of approximately ten kilograms of cocaine at the same time and place, and with the single unifying intent of distribution. I am convinced that, had each cache of cocaine weighed 500 grams, rather than 5 kilograms, the prosecution would have viewed the "fact situation" as a single crime of possession of over 650 grams of cocaine with intent to distribute. I believe that interpretation would have been correct, and that a single prosecution would have afforded examination (and punishment) of the entirety of Rashad's conduct. The course chosen

by the State in this instance was an impermissible effort to secure two bites at the apple, at the expense of Petitioner's constitutional right not to "be subject for the same offence to be twice put in jeopardy".

Having determined that both drug possessions were part of the same unlawful conduct, I find that application of the "Blockburger rule" of statutory construction would preclude a second prosecution following Rashad's first trial and conviction. Each of Rashad's two state court prosecutions charged him with approximately one half of a single possessory crime. Having been found guilty in the first prosecution, Petitioner was not subject to being placed in jeopardy again for the remainder of it. The second prosecution violated Petitioner's constitutional protections under the Double Jeopardy Clause of the Constitution.

D. CONCLUSION

After review of the pleadings, for the reasons stated herein, I recommend that the Petition for Writ of Habeas Corpus be GRANTED.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. Section 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right .of appeal. United States v. Walters, 638 F. 2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140 (1985), Howard v. Secretary of Health, and Human Services, 932 F. 2d 505 (6th Cir. 1991) . Filing of objections that raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Smith v. Detroit Federation of Teachers Local 231, 829 F. 2d 1370, 1373 (6th Cir. 1987), Willis v. Secretary of Health and Human Services, 931 F. 2d 390, 401 (6th Cir. 1991). Pursuant to E. D. Mich. LR 72.l(d) (2), a copy of any objection is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall not be more than five (5) pages in length unless by motion and

order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

DONALD A. SCHEER
UNITED STATES MAGISTRATE JUDGE

Dated: August 30, 1995

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWIGHT RASHAD,

Petitioner,
v.
SHERRY BURT,

CIVIL ACTION NO. 94-CV-71785-DT
DISTRICT JUDGE PAUL D. BORMAN
MAGISTRATE JUDGE DONALD A. SCHEER

Defendant.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Report and Recommendation was served upon the attorneys of record or parties appearing in the above entitled cause by mailing the same to them at their respective address with postage fully prepaid thereon, on this 30th day of August, 1995.

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Judge Donald A. Scheer

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DWIGHT RASHAD,

Petitioner,

CIVIL ACTION NO. 94-CV-71785-DT
JUDGE PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

SHERRY BURT,

Respondent.

ORDER

The Court has reviewed the file and the Magistrate Judge's Report and Recommendation. The proposed Report and Recommendation of the Magistrate Judge is hereby accepted and entered as the findings and conclusions of the Court.

Therefore, it is ORDERED that the Petitioner's Petition for Writ of Habeas Corpus is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

DATED: November 30, 1995

APPENDIX C

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0095P (6th Cir.)
File Name: 97aOO95p.06

No. 96-1040

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Dwight Rashad,
Petitioner-Appellee,
v.

Sherry Burt,
Respondent-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan

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Decided and Filed March 14, 1997

Before: MARTIN, Chief Judge; WELLFORD and MOORE, Circuit Judges.

MARTIN, C. J., delivered the opinion of the court, in which MOORE, J., joined. WELLFORD, J. (pp. 11 - 1 4), delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Chief Judge. Dwight Rashad sought a writ of habeas corpus, alleging that his state court felony conviction for possession with intent to deliver over six hundred and fifty grams of

cocaine after an earlier conviction for possession of the same substance violated his rights under the Double Jeopardy Clause of the Fifth Amendment. The district court found double jeopardy and issued the writ. We agree and affirm.

I.

Rashad's two convictions grew out of the execution of a single search warrant at a private home on September 7, 1988. On that date Detroit police conducted surveillance of a residence at 20219 Greydale in Detroit, Michigan. Their purpose was to execute a search warrant for drugs allegedly contained in the residence. During the surveillance, Rashad arrived at the house in a 1988 Lincoln automobile. Approximately ten minutes after Rashad, who was carrying a briefcase, entered the house by means of a key, the officers executed the search warrant.

After securing the premises and its occupants (Rashad, a woman, and an infant), police brought a drug detection dog into the residence. The dog reacted to a locked storage area in the basement in which police discovered and seized approximately five kilograms of cocaine, including

several kilogram-sized bricks of cocaine that were wrapped in green paper, as well as packing material and narcotics paraphernalia.

Inside Rashad's briefcase, officers found a driver's license bearing Rashad's photograph, but a different name and address. The briefcase also contained a key ring which held keys to the front entrance and drug storage area of the house, and to the Lincoln automobile in which Rashad had arrived.

In the course of executing the search warrant, the narcotics dog alerted officers to the interior of Rashad's automobile, which was parked in the driveway of the residence. When cocaine residue was found within it, the vehicle was impounded for subsequent forfeiture and remained in police custody.

Approximately one week later, an informant indicated to police that cocaine was stored in a compartment in the Lincoln. On September 19, police obtained a search warrant for the car, and on September 22 a detailed search led to the discovery of a compartment in a rear quarter panel. In the compartment, officers found a plastic bag containing approximately 4850 grams of cocaine, including four separate kilogram

packages wrapped in green paper bearing the initials XELA. Officers also found several bundles of heroin, a nine millimeter handgun, and a wallet containing Rashad's driver's license.

In April 1989, Rashad was tried before a jury on a charge of possession with intent to deliver greater than six hundred and fifty grams of cocaine in violation of Mich. Comp. Laws Ann. § 333.7401(2)(a)(i). That case arose out of the seizure of cocaine from the basement of the Greydale residence. The jury found Rashad guilty of a lesser included offense, possession of greater than six hundred fifty grams of cocaine, see Mich. Comp. Laws Ann. § 333.7403(2)(a)(i), and he was sentenced to forty to one hundred years imprisonment.

In an October bench trial, Rashad was tried on a charge of possession with intent to deliver over six hundred and fifty grams of cocaine (in violation of the same Michigan statute) in connection with the drugs which were found in the hidden compartment of the Lincoln. The defense moved to dismiss, claiming that the action was a successive prosecution for the same offense which violated the Double Jeopardy Clause of the Fifth Amendment. The court denied the motion, stating

that the two prosecutions related to two separate transactions. At the close of the trial, Rashad was found guilty as charged, and sentenced to life imprisonment without the possibility of parole.

Rashad appealed this second conviction to the Michigan Court of Appeals on the ground that it violated the Double Jeopardy Clause of the Fifth Amendment. That court, in a June 1992 opinion, affirmed both convictions and specifically held that the trial for the cocaine found in the car was not barred by double jeopardy. In May of 1993, the Michigan Supreme Court denied Rashad's application for leave to appeal, with two judges dissenting.

In May 1994, Rashad filed a petition for the writ of habeas corpus in the United States District Court for the Eastern District of Michigan, claiming that his second conviction violated the Double Jeopardy Clause. The District Court accepted Rashad's argument and granted the writ of habeas corpus in November 1995. From that ruling, the State appeals.

II.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be subject for the same offence to be twice put in

jeopardy of life or limb. U.S. Const. amend. V. The clause has been interpreted as protecting criminal defendants from successive prosecutions for the same offense after acquittal or conviction, as well as from multiple punishments for the same offense. Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977). The question we must decide is whether Rashad's trial and conviction for the cocaine seized from the car constitutes a successive prosecution for an offense for which he was already tried -- possession with intent to distribute the cocaine found in the residence. Rashad claims that it does, on the ground that the cocaine seized from the house and the car are parts of the same criminal transaction. The State, in contrast, asserts that the two stashes represent two separate offenses, and thus that Rashad's second prosecution is not barred by double jeopardy.

The traditional test for double jeopardy claims is the same elements test set forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932) (requiring the court to determine whether each charged offense requires proof of an additional fact which the other does not). The Blockburger test is designed to deal

with the situation where closely connected conduct results in multiple charges under separate statutes. In a Blockburger case, the critical question is whether the multiple charges in reality constitute the same offense. Thus, the Blockburger test focuses on whether the statutory elements of the two crimes charged are duplicative. If the elements of the two statutes are substantially the same, then double jeopardy is violated by charging the defendant under both.

Although it plays a prominent role in double jeopardy analysis, the Blockburger test is insufficient where, as here, the concern is not multiple charges under separate statutes, but rather successive prosecutions for conduct that may constitute the same act or transaction. Indeed, multiple charges that satisfy the Blockburger standard, and thus may properly be joined in a single prosecution, may nevertheless violate double jeopardy if prosecuted successively. Jordan v. Commonwealth of Virginia, 653 F.2d 870, 873 (4th Cir. 1980). As the Supreme Court has stated, The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Brown, 432 U.S. at 166 n. 6, 97 S. Ct. at 2226. In Jordan, the Fourth

Circuit articulated the need for a different standard:

> Successive prosecutions implicate a component of double jeopardy protection not implicated in single prosecutions of joined charges such as those involved in Blockburger. The protection against retrial itself. In this component double jeopardy ... insures that having once run the gauntlet of criminal trial . . . , a person shall not be required to run essentially the same gauntlet again. It protects not only against multiple punishments but against multiple trials for the same offense.

Jordan, 653 F.2d at 873 (citing United States v. Wilson, 420 U.S. 332, 343-44, 95 S. Ct. 1013, 1021-22, 43 L. Ed. 2d 232 (1975)).

The Blockburger standard, then, does not help us resolve a double jeopardy inquiry involving successive prosecutions. The concern in such a situation is whether a defendant is being prosecuted twice for the same act or transaction. The proper standard for determining if this has occurred, and thus if the two prosecutions violate double jeopardy, is to ask whether the actual evidence needed to convict the defendant in the first trial is the same as the evidence needed to obtain the second conviction. If the same evidence will serve for both convictions -- irrespective of whether the convictions are under statutes that satisfy Blockburger's same elements test - - the second prosecution is barred by

double jeopardy. {1}See Jordan, 653 F.2d at 873 (citing Ex parte Nielson, 131 U.S. 176, 188, 9 S. Ct. 672, 676, 33 L. Ed. 11 8 (1889)). Stated another way, successive prosecutions based on the same fact situation are barred by double jeopardy if the separate charges could have been joined and no significant additional fact was required in the second prosecution. Id. at 874.

Applying this standard to the present case demonstrates that Rashad's second prosecution did violate double jeopardy principles. Rashad's first prosecution charged him with possession with intent to distribute cocaine, and involved the drugs found in the Greydale

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{I} Judge Wellford's dissent states, "The significant factor to the majority was that both separate charges -- possession for intent to distribute cocaine -- were the same." This is not an accurate statement of our opinion. As set forth here, the focus of the successive prosecution test is whether the evidence needed to convict is the same in both prosecutions. That the two prosecutions are based on the same statutory violation may reflect certain similarities in the two crimes, but such a fact does not determine whether the double jeopardy clause has been violated by a successive prosecution.

residence. Rashad's second prosecution was also for possession with intent to distribute cocaine, and was based on the drugs found in the Lincoln automobile. The only additional fact required to convict on this second prosecution was the cocaine s location in the car. This fact is not significant under the circumstances, however, because the location of the drugs in the car does not indicate a separate crime from that indicated by the drugs in the house -- possession with intent to distribute. Moreover, the separation of the charges into two trials has more to do with prosecutorial expediency -- the opportunity to try Rashad twice for a single criminal transaction -- than with substantive differences between Rashad's purportedly separate crimes. Such strategic maneuvering is forbidden by the Double Jeopardy Clause. As the Jordan court emphasized, ". . . It is well settled that double jeopardy protections may not be avoided by the simple expedient of exercising prosecutorial discretion to divid[e] a single crime into a series of temporal or spatial units." Id. at 875 (quoting Brown, 432 U.S. at 165, 97 S. Ct. at 2225).

Here, the relevant fact situation involves Rashad's possession of a total of several kilograms of cocaine at the same time and place, and

with the single unifying intent of distribution. Thus, Rashad's possession of cocaine in his home and in his automobile constituted a single transaction. The seizure, and in part the discovery, of both quantities of the drug resulted from the same police confrontation with Rashad. Rashad's possession of both quantities occurred at the same time and place, and displayed a single intent and goal -- distribution. Rashad's simultaneous constructive possession of two large quantities of cocaine, packaged in similar fashion and locked within secure compartments in property maintained by him, show that the relevant fact situation includes Rashad's possession of both caches of cocaine.

The State asserts, however, that the Michigan Court of Appeals correctly found that the two caches represented two separate transactions. From the existence of packaging materials, sifters, mixers and cutting agents in the home, the Michigan court concluded that the supply of cocaine located there was intended for future distribution, whereas the cocaine in the car supported the independent goal of transporting or delivering that cocaine to an unknown destination.

We cannot agree with this conclusion. Not only is record

evidence as to the specific intent for each lot of cocaine lacking, but it makes for an extremely cramped view of the meaning of possession and distribution to argue, as the State does, that since the two lots could have been intended for distribution to different locations at different times, they were necessarily part of two distinct criminal transactions. At the time of the police action on September 7, 1988, there was no evidence to support the inference that the full supply of cocaine could not, and would not, be employed in a single distribution. At that point in time, Rashad possessed the full amount of cocaine with the same intent of distributing it at whatever future times, and in whatever amounts best suited him. Absent evidence of separate and distinct dedications of the two caches, his possession was a single, undivided offense.

Decisions from other circuits support our conclusion that Rashad was involved in a single criminal transaction. Generally, courts which have considered the issue have determined that separate convictions for possession of the same controlled substance will not violate the Double Jeopardy Clause if the possessions are sufficiently differentiated by time, location, or intended purpose. See United States v. Johnson, 977 F.2d

1360, 1374 (10th Cir. 1992), cert. denied sub nom. Behrens v. United States, 506 U.S. 1070, 113 S. Ct. 1024, 122 L. Ed. 2d 170 (1993); United States v. Maldonado, 849 F.2d 522, 524 (11th Cir. 1988); United States v. Blakeney, 753 F.2d 152, 154-55 (D.C. Cir. 1985); United States v. Palacios, 835 F.2d 230, 233-34 (9th Cir. 1987).

None of the legitimate bases for differentiating the stashes of cocaine in this case appear to exist. The entirety of the police confrontation with Rashad occurred during the execution of the search warrant for his residence. Both quantities were located at his home and both were seized at essentially the same time and place. There is no evidence in the record that either stash, or any specific amount of cocaine whatever, was intended by Rashad to be dedicated to a specific distribution. Johnson, 977 F. 2d at 1374 (holding that in the absence of demonstrated intent that the two caches were for different purposes or transactions, their possession should have been charged in a single prosecution). Instead, the two stashes of cocaine were possessed, seized, and ultimately found as part of a continuous time sequence, and both possessions were unified by a single intent and goal of distribution.

Thus, the reasoning set forth in Johnson, Maldonado, Blakeney, and Palacios supports the conclusion that Rashad's second prosecution violates the Double Jeopardy Clause.

By treating Rashad's behavior as two separate crimes simply because the two stashes of drugs were stored in different locations, the State has subjected Rashad to two trials for the same criminal transaction. We note that the cocaine at issue was stored in a rear quarter panel of Rashad's car at the time police initially searched and impounded the vehicle. A fully competent search of the car on the day of its seizure would have uncovered this second stash of cocaine at the same time that drugs were found in the Greydale residence. Thus, a proper and thorough police investigation would have revealed the evidence necessary to charge possession of all the cocaine in a single count or, at the very least, in a single indictment. Instead, each of Rashad's two state court prosecutions charged him with approximately one-half of a single possessory crime. This is exactly what the Double Jeopardy Clause is designed to guard against. Were we not to find a double jeopardy violation on these facts, we would, in effect, be rewarding the State for

its failure to discover evidence in a timely manner, as we would be allowing the State to benefit from this late discovery by prosecuting a single transaction as two separate crimes.

It is significant that even at the date the drugs were discovered in the Lincoln, the State had ample time to join the two charges in one trial, as Rashad's initial prosecution was still in its early stages. We have no doubt that had each stash of cocaine weighed five hundred grams, rather than five kilograms, the prosecution would have viewed the two stashes as part of a single transaction in order to reach the six hundred and fifty gram threshold required under Michigan law. That interpretation would have been correct, and a single indictment and prosecution would have afforded examination and punishment of the entirety of Rashad's conduct. The actual course chosen by the State was an impermissible effort to secure two bites at the apple at the expense of Rashad's constitutional right not to be twice put in jeopardy for the same offense. We therefore hold that Rashad's second prosecution violates the Double Jeopardy Clause, and affirm the district court s grant of the writ of habeas corpus.

HARRY W. WELLFORD, Circuit Judge, dissenting. The facts in this case, as set out in Judge Martin's opinion, are not in dispute. In fact, in his brief Rashad specifically incorporated the defendant's version of the "Statement of the Case." The discovery of the very large quantity of cocaine and several bundles of heroin from the car, as well as a weapon and Rashad's identification, occurred some two weeks after discovery of about five kilos of cocaine in Rashad's basement storage area. There was a separate indictment and conviction on the contraband drugs found pursuant to a search warrant in the home.

At issue in this appeal was the subsequent indictment and conviction of Rashad on the drugs that were eventually found in a separate stash in a hidden compartment of Rashad's car, which had actually been seized from his driveway during the search of the home.{1} Finding that "the location of the drugs in the car does not indicate a separate crime from that indicated by the drugs in the house," the

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{1} The police executing the search warrant for the home found a trace of cocaine only in the car following an alert by a narcotics dog. Some time later, an informant notified the police that there were narcotics in the automobile. A second search warrant authorized the subsequent successful car search.

majority concludes that the "second prosecution did violate double jeopardy principles." I disagree and, therefore, dissent.

The significant factor to the majority was that both separate charges -- possession for intent to distribute cocaine -- were the same. Yet, there are other important factors in the double jeopardy equation that are equally significant, in my view. The drugs were located in different places; some was located in the basement of defendant's home while the other was located a considerable distance away in defendant's car. The drugs were also located at different times--more than a two week interval occurred. Furthermore, two separate quantities of contraband were found by different police officers acting pursuant to separate search warrants at entirely different locations. There were even separate narcotics dogs involved in the two separate seizures. Also, a different informant alerted the police to the second cache of drugs. All of this indicates to this writer that the seizures and resulting charges were separate, distinct, and not inexorably interrelated.

More than that, I think it significant that the Michigan state courts also considered these same circumstances and factors and determined that

there was no double jeopardy violation. The Michigan Court of Appeals found:

> [T]he cocaine confiscated from the Lincoln, supports the independent goal of transporting or delivering that cocaine to an unknown destination. Furthermore, it was never established that the cocaine found in the Lincoln was part of the same cocaine found in the house. The facts indicate that the defendant's possession of the cocaine in the home was simultaneous to his possession of the cocaine in the vehicle and not one unitary and continuous criminal episode. Jackson, 153 Mich. App. at 50. Finally, the police did not get a search warrant for the Lincoln until an informant told police that the vehicle contained contraband.

People v. Rashad, No. 118136,11877,124060, at p. 4 (Mich. App. June 23, 1992). Accordingly, the Michigan court concluded that there was no "meaningful factual connection between the cocaine found in defendant's home and that found several days later in the quarter panel of defendant's vehicle," and thus no double jeopardy violation. I find myself entirely in agreement with the Michigan courts that denied relief to Rashad.

It seems clear to me that there were separate offenses in this case, discovered at different times and at different places. I find no basis to conclude, as does the majority, that what was involved here was "prosecutorial expediency" or "strategic maneuvering." Jordan v.

Commonwealth of Virginia, 653 F.2d 870 (4th Cir. 1980), relied upon by the majority is not even close on its facts to the instant case. Defendant Jordan committed the offenses in controversy "over a period of a few minutes"--one for obtaining a drug by forged prescription and one for possession of that drug. This was obviously "closely related conduct." Id. at 871, 872. Evidence used to convict on the first offense "would totally have sufficed to sustain the later felony conviction." Id. at 874. It was also, in Jordan, a "continuing offense." Id. at 875. The case under consideration in this appeal is vastly different.

In re Neilsen, 131 U.S. 176 (1889), also mentioned by the majority, is similarly of no help to Rashad's cause, in my view. Neilsen involved two charges occurring one day apart: (1) unlawful cohabitation with more than one woman, and (2) adultery with one of the women involved in the first charge. The Supreme Court, on those entirely different facts, found a double jeopardy violation. That case simply cannot be a basis for finding a double jeopardy violation for separate caches of drugs, separate and divergent times and places of discovery, and by different police officers after an intervening informant's

intelligence.

Nor is Brown v. Ohio, 432 U.S. 161 (1973), really applicable to support the majority in this case. The two charges found to involve double jeopardy in Brown were stealing an automobile following conviction for the lesser-included offense of operating the same vehicle without the owner's consent. The majority, in the instant case, finds "the Blockburger test" to be "insufficient" on these facts, yet Brown relied principally upon Blockburger v. United States, 284 U.S. 299, 302 (1932), as controlling. In Brown, joyriding and auto theft were "the same offense" involving the same car. I point to its language that "[a]n exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." Id. at 169, n.7 (emphasis added). In our case, the additional facts--the additional large quantity of drugs in the car--had not been discovered until two weeks later after the police found cocaine in the house.

In sum, I find the authority cited by the majority for its position

to be easily distinguishable and the cases from other circuits cited by the majority{2} to be supportive of this dissent. Accordingly, I would conclude that double jeopardy principles were not violated by the separate charges and convictions of defendant by state officials, and I would, therefore, deny the writ of habeas corpus.

{2} United States v Johnson, 977 F.2d 1360, 1374 (10th Cir. 1992), cert. denied sub nom. Behrens v United States, 506 U.S. 1070 (1993); United States v Maldonado, 849 F.2d 522, 524 (11th Cir. 1988); United States v Blakeney, 753 F.2d 152, 154-55 (D.C. Cir. 1985); United States v Palacios, 835, F.2d 230, 233-34 (9th Cir. 1987).

APPENDIX D

No. 96-1040

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DWIGHT RASHAD,	)	
	)	
Petitioner-Appellee,	)	Filed June 18, 1997
	)	Leonard Green, Clerk
V.	)	
SHERRY BURT,	)	
	)	
Respondent-Appellant.	)	

BEFORE: MARTIN, WELLFORD, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied. Judge Wellford would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

Supreme Court, U.S.
FILED
DEC 15 1997
CLERK

No. 97-343

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

SHERRY BURT,

Petitioner,

v.

DWIGHT RASHAD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

DO SUCCESSIVE PROSECUTIONS FOR THE POSSESSION OF MULTIPLE CACHES OF CONTRABAND VIOLATE THE DOUBLE JEOPARDY CLAUSE WHEN SAID POSSESSION CONSTITUTES A SINGLE OFFENSE?

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STATEMENT OF THE CASE

Respondent accepts the facts as stated in Petitioner's "Statement of the Case". Additional facts where relevant are set forth within Respondent's "Reasons for Denying Writ of Certiorari".

REASONS FOR DENYING WRIT OF CERTIORARI

Respondent maintains that successive prosecutions for possession of separate stashes of contraband violate the Fifth Amendment prohibition against Double Jeopardy. As a result of Respondent having been twice charged and convicted of the identical offense, possession with intent to deliver cocaine, (MCL 33.7401) the "same elements" test set forth in *Blockburger v. United States,* 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932) appears to have been met:

> In general terms, the elements of the offense in each prosecution were the same because each offense involved a violation of the same statutory provision, *Petitioner's Petition for a Writ of Certiorari* (Page 18).

However, the courts below have concluded that a traditional *Blockburger,* analysis will not suffice in this instance:

> Although it plays a permanent role in double jeopardy analysis, the *Blockburger* test is insufficient where as here, the concern is not multiple charges under separate statutes, but rather successive prosecutions for conduct that may constitute the same act or transactions, *Rashad v. Burt,* 108 F.3d 677 (6th Cir. 1997) at page 679.

Respondents maintains, as the the Sixth Circuit Court of Appeals in *Rashad,* at page 680, that "multiple charges

that satisfy the *Blockburger* standard, and thus may properly be joined in a single prosecution, may nevertheless violate double jeopardy if prosecuted successively", citing *Jordan v. Commonwealth of Virginia,* 653 F.2d 870, 873 (4th Cir. 1980). As more fully set forth in *Jordan,* the Court of Appeals for the Fourth Circuit stated:

> Successive prosecutions implicate a component of double jeopardy protection not implicated in single prosecutions of joined charges such as those involved in *Blockburger* and *Gore*: the protection against retrial itself. In this component, double jeopardy vindicates principles of finality and repose of former judgments and of fundamental fairness and simply are not involved in a joined charged prosecution. Basically it insures that having once "run the gauntlet" of criminal trial to judgment either of conviction or acquittal, a person shall not be required to run essentially the same gauntlet again. It protects not only against multiple punishments but against multiple trials for the same offense. See *United States v. Wilson,* 420 U.S. 332, 343-44 (1975); *Green v. United States,* 355 U.S. 184, 187-88 (1957); *United States v. Oppenheimer,* 242 U.S. 85 (1916). Because an additional interest is at stake, the test for determining whether the "same offense" is involved in successive prosecutions is one more protective of criminal defendants than the relatively strict "two offense" test of *Blockburger* that is decisive against defendants when satisfied in single prosecutions. *Jordan,* supra at 873.

As indicated by the Court of Appeals for the Sixth Circuit in *Rashad,* "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense", citing *Brown*

v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) at 166 n.6.

Granted, this Court in *United States v. Dixon,* 509 U.S. ___ , 125 L.Ed.2d 556, 113 S.Ct. 2849 (1993) reversed the "same transaction" test announced in *Grady v. Corbin,* 495 U.S. 508, 109 L.Ed.2d 548, 110 S.Ct. 2084 (1990), just three years earlier. Further, a majority of this Court in *Dixon,* rejected the analysis which subscribed to affording different meanings to the Double Jeopardy Clause insofar as the "successive prosecution strand" is concerned, *Dixon* at 556. That being the case, Respondent maintains that *Dixon* should not be read to approve of multiple prosecutions where the activity charged constituted a single offense.

Petitioner has confused the issue by claiming the Sixth Circuit Court of Appeals adopted a "same transaction" test, rather than reversing a successive prosecution of Respondent for what was a single offense. What the Sixth Circuit Court of Appeals has prohibited in *Rashad,* is a successive prosecution where the charges should have been joined and where no significant additional fact was required for the second prosecution. Language in *Dixon,* at page 573, permitting the prosecution to feel "free to bring them separately, and . . . win convictions in both", should not be construed to permit the prosecution to take a single criminal episode and divide it into two separate prosecutions. Where the criminal activity charged in successive prosecutions results from a single transaction involving the same elements, one trial is all the prosecution is entitled to. It is well settled that double jeopardy protections may not be avoided by the simple expedient of exercising prosecutional discretion to "divide a single crime into a series of temporal or spatial units", *Jordan* at page 875.

In this respect, the cases of *United States v. Woods*, 568 F.2d 509 (6th Cir. 1978) and *United States v. Stephens*, 1997 Fed. App. 0095P (6th Cir) are illustrative. In both cases the defendants were charged with multiple drug offenses involving separate caches of narcotics. In reversing the multiple convictions in *Stephens*, the Sixth Circuit Court of Appeals stated:

> Thus, the structures of *Woods* control and require that Stephens be convicted of only one count of possession with intent to distribute cocaine. Therefore, the district court erred by failing to merge the two offenses.

Granted several other circuits have held that where multiple stashes of drugs can be demonstrated to be intended for different purposes or transactions, conviction of separate counts will not violate the Double Jeopardy Clause (see cases cited, *Petitioner's Petition for Writ of Certiorari*, pps. 20-25). However, in the absence of "demonstrated intent" that the two possessions were for different purposes or transactions, their possession should have been charged in a single prosecution. See *United States v. Johnson*, 977 F.2d 1360, 1374 (10th Cir. 1992). It is interesting to note the troubling aspect of future prosecutions in this area where the prosecution is free to take "two bites at the apple". In *People v. Hahn*, 183 Mich. App. 468 (1990), police seized separate caches of drugs throughout the defendant's house and in his car. In Michigan, separate statutes and penalties exist for increasing amounts of drugs. In *Hahn*, the single prosecution of the defendant was based upon the combined total of the drugs seized in both his residence and vehicle. The defense objected to consolidation of the cocaine contending it was discovered in

different locations. The Michigan Court of Appeals disagreed, stating:

> Since the record discloses sufficient evidence from which it can be determined that defendant possessed all the separate amounts, it logically follows that defendant also possessed the total amount, at 470.

In the instant case, had the total of *each* of the two caches not exceeded 650 grams, Respondent would have faced a single prosecution in which both caches were added together in order to achieve the most severe penalty. Thus, it would have been the Petitioner and not the Respondent calling for a single prosecution.

Prosecutors should not have the luxury of selecting whether to add the caches in a single prosecution or to initiate separate prosecutions at their whim. Only where it can be clearly shown that the two caches represent different transactions, should multiple counts be allowed, let along multiple convictions. In this particular case there was ample time to notify Respondent and for Petitioner to prepare for a single prosecution involving all of the contraband.

With respect to the similar nature of the two possessions, Petitioner in its Brief on Appeal to the Sixth Circuit, admitted that "there is no question that similarities exist between the two prosecutions, p. 18. Those facts which suggest that the instant case constitutes only one offense are as follows:

1. Both offenses occurred on the same date and at the same time.

2. Both offenses occurred in approximately the same location, Respondent's residence and a vehicle parked outside his residence.

3. Both offenses involved possession of several kilograms of cocaine similarly wrapped and packaged.

4. Both stashes were in close proximity to several clear empty plastic bags.

5. Both stashes were hidden, one in a secret panel in Respondent's automobile and the other in a locked storage area under the basement stairway.

6. Both stashes indicated a single intent and goal (i.e., distribution).

7. Keys to both the vehicle and locked storage compartment were discovered on a key chain inside the brief case Respondent carried into his residence.

8. The witnesses necessary to prosecute Respondent for both caches of cocaine are virtually identical.

Granted, the cocaine in Respondent's vehicle was not discovered until several days after the vehicle was impounded and ultimately searched by police. However, the protection against successive punishments for the same offense should not be predicated upon the comprehensive nature of the search by police.

By dividing the prosecution into two separate cases, Petitioner was able to double the odds in favor of at least one conviction, wear down the defense (second trial was a bench trial unlike the first) and neutralize any previously asserted defense strategy. If separate stashes of contraband are to be merged for purposes of a defendant's claim of multiplicity, then successive prosecutions must also fail. As quoted by the Sixth Circuit in *Stephens,*:

> "we see no indication that Congress intended to permit multiplication of the offenses of possession at any given time by a defendant upon evidence that the heroin may merely have been separately packaged or stashed". *Woods,* at 513-14.

CONCLUSION

WHEREFORE, Respondent prays that this Honorable Court deny plenary review, and affirm the holding of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDICES

Respondent is satisfied with Appendix "A", "B", "C" and "D" as set forth in the Petition For A Writ of Certiorari, filed by Petitioner.